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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1196

RICHARD and MARGO KLINE, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

vs.

COLDWELL, BANKER & CO., REALTORS, Etc., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 508 F. 2d 226.

Question Presented.

Should the Court review this case where the Court of Appeals ruled that, measured against proper legal standards, the action was not suited for class litigation because: (a) individual questions predominated over common questions, (b) the suit was not superior to the other available alternatives for the fair and efficient adjudication of the controversies, and (c) was not manageable?

Statement of the Case.

A. The Pertinent Pleadings.

The amended complaint [R. 1][1] alleges antitrust claims by plaintiffs Richard and Margo Kline, husband and wife, on behalf of themselves and all sellers of real estate in Los Angeles County who within the previous four years used the services of any of the 32 named defendant real estate brokers or any of the defendant class members, brokers who belong to the defendant Los Angeles Realty Board.[2]

The complaint charges a conspiratorial restraint of trade violative of §1 of the Sherman Act (15 U.S.C. §1). It alleges that "the defendants and each of them have knowingly and unlawfully combined, conspired and agreed" to raise and fix the commissions they would charge as real estate brokers, to prevent and suppress competition, to publish and circulate and adhere to schedules of commissions, to refuse to accept multiple listings at other than fixed commission rates, and to adhere to exclusive listings to discourage real estate sales which bypassed the defendants [Amended Complaint, ¶¶27, 28, R. 12].

By their answers the defendants generally denied the charges, the defendant Board admitting that it published and distributed a commission schedule but deny-

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[1]"R" refers to the record on appeal in the Court of Appeals. "Pet." refers to the petition for writ of certiorari. "App." refers to the appendix to the petition. Emphasis within quotations is supplied unless otherwise noted.

[2]The representative party defendants are the Los Angeles Realty Board (hereinafter "Board"), its divisions and branch and 32 named broker defendants.

ing that any member was compelled or required to follow it. The Board's schedule states:

> "It should be understood that no member of the Los Angeles Realty Board, or any other Realtor is in any way bound by this Schedule. The amount of the commission on any real estate transaction is a matter for the parties to that transaction and is in no way subject to the control of the Los Angeles Realty Board." [R. 59]

Every one of the defendants denied participation in any conspiracy [R. 46, 65].

B. The Discovery.

In the two-year period prior to the class action order, the parties engaged in extensive discovery addressed to the merits and the class issues, pertinent parts of which were before the courts below. In particular, plaintiffs were afforded full opportunity by the district court to pursue class action related discovery by interrogatories, by deposition and by document production requests [R. 119-121]. Plaintiffs propounded extensive interrogatories and document production requests both to the Board [R. 152, 166], and to each of the 32 broker defendants [R. 171, 182].

The discovery disclosed the following: The claim of the representative plaintiffs, the Klines, concerns but one transaction, and they used the services of only one broker defendant, Lelah T. Pierson Co. [R. 423-24, 426-28]. The Klines seek to represent all sellers of Los Angeles County residential property over the four-year period prior to the suit, involving an estimated 400,000

transactions[3] in which assertedly more than 2,000 brokers performed services.[4]

The individual character of the questions affecting the liability of each broker was shown by the discovery responses of the defendant brokers. Virtually every broker answering responded negatively to inquiries whether the Board's schedule of commissions was used or followed. Each gave highly individual responses to queries exploring the methods by which commissions were determined.[5] Some emphasized their analyses of their operating costs as a major factor influencing their commission;[6] some focused on the condition of the local market in which they operated;[7] still others denied that they had any commission "policy" but emphasized their relationship with each person listing property with them and the circumstances peculiar to each transaction including the negotiations necessary to close the deal.[8]

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[3]During the four-year period here involved approximately 800,000 deeds were recorded in Los Angeles County [R. 1050, 1070-71]. Based on this fact, defendants estimated that 400,000 sales could be involved in this class suit [R. 1050]. This estimate was not disputed below, and plaintiffs suggested to the Court of Appeals that the plaintiff class might be even larger. *Kline v. Coldwell, Banker & Co.*, 508 F. 2d 226, 228 n.1 (9th Cir. 1974).

[4]The Board is a California corporation which, during the relevant period, had a membership of approximately 2,000 licensed brokers [R. 58, 463].

[5]R. 562, 574, 592, 607, 626, 641, 652, 663, 677, 687, 696, 706, 716, 726, 736, 747, 761, 772, 788, 797, 805, 821, 838, 853, 863, 877, 890, 945, 957, 1121.

[6]R. 641, 736, 747, 821, 863, 957.

[7]R. 626, 736, 788, 797, 945.

[8][R. 574, 652, 663, 677, 772, 821, 890]. Illustrative of the highly individual nature of each claim sought to be class litigated is the statement by broker defendant John Langdon:

"I received a copy of the Board's Desk Diary each year. I am aware that this Desk Diary contained a list of com-

Pierson, the broker with whom the Klines dealt, denied using or following the Board's schedule [R. 877], stating that in determining commissions the company takes:

> ". . . into consideration the increase in costs such as advertising, telephone, general office and business expenses; as well as considering what other real estate brokers in the area were charging." [R. 878].

The discovery also reflected the arms-length negotiation of commissions involved in claims sought to be class-tried. Plaintiff Simon,[9] who ultimately listed his property with defendant Helen Meigs, rejected the initial listing agreement tendered by Mrs. Meigs for a percentage commission. Thereafter, for nearly two months Mr. Simon, aided by his lawyer, and Helen

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missions or fees, however, this list meant nothing to me. I have always determined my rate of commission independently and I had determined in April 1966, that in order to get the return I felt was proper, I would have to ask a 6% rate of commission. Since April 1966, the large majority of my listings have been at 6%. In any event I have never communicated with the Board or with its divisions, branch or officers or directors regarding commissions or fees. I have never discussed the Board's list of commissions or fees with other members of the Board. I was never asked or told or pressured by any other broker to charge a specified fee or follow any schedule or list of fees for any real property transaction in which I was involved, nor have I ever asked or told or pressured any broker outside my Company to charge a specified fee or follow any schedule or list of fees. I have had nothing to do with the Board's list of commissions or fees; my Company and I did not aid in the drafting of this list; did not agree that it be published or distributed; did not request that it be prepared or sent to me or to any other person; did not agree to use it; was never asked or told to use it; never asked or told anyone else to use it; and never did use it." [R. 1141-42].

[9]Plaintiffs Martin Simon and Martin and Florence Sherman were not certified as representatives of the plaintiff class. They did not appeal that ruling and have not joined in the petition.

Meigs negotiated virtually every element of the listing, including the commission.[10]

C. The Class Action Proceeding.

Following discovery, extensive briefing and two hearings, the trial court granted petitioners' motion that the suit be maintained as a class action under Rule 23(b)(3) [R. 82, 1328]. Defendants urged that issue required pragmatic evaluation of courtroom realities in relation to an attempted trial of the multifaceted separate questions presented by plaintiffs' proposed theory of the case; that such an evaluation showed that the claims *and* defenses presented serious and substantial questions for resolution at trial which were *not* common, but to the contrary, were individual to each claimant and each defendant class member; and that the trial of those individual questions would overwhelm and predominate over the trial of the few that were common with the result that the suit would be unmanageable and not superior for the fair and efficient adjudication of the controversies.

In response, petitioners asserted a theory which, they said, would short-circuit the myriad litigations this suit presented.[11] They urged (as they also did in the Court of Appeals) that the adjudication of these treble damage antitrust claims did *not* require claimant-by-claimant v. broker-by-broker litigation, claiming each broker's liability would be *established* on a showing: (i) of his knowledge of the Board's schedule and (ii) that he charged commissions in conformity with the schedule in

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[10]Deposition of Martin Simon, Vol. II, 142-233, Exhibits K, N, R.

[11]Petitioners never asserted below that their discovery had not been ample to present their position on the class action issue.

the "vast majority of transactions" [R. 1172-73].[12] Alternatively, they urged that each broker's liability would also be *established*—and individual litigation averted—by mere proof of his continued membership in the Board after learning of the schedule (on their assumption that the schedule was *per se* illegal).[13]

Thus, the questions posited by the petitioners, in both the district court and the Court of Appeals, were: (1) whether these theories of generalized proof designed to avoid individual litigations, provided a means whereby the *full* trial of the case and all its myriad claims could be adjudicated; (2) whether thereby individual questions, otherwise predominant, would be eliminated; and (3) whether such a litigation was fair, efficient and manageable within the meaning of Rule 23(b)(3).

D. The District Court Order.

The district court, accepting the petitioners' concepts, certified both the plaintiff and defendant classes. It identified the common issue as: "Was there a conspiracy to fix the prices and was it [in gross] adhered to?" and stated "that issue should not have to be tried over and over again against individual defendants." The individual question was identified as "[D]id the particular defendant adhere to this schedule? I suppose you could break that down to: Did he know of the schedule, and did he *conform generally* to it? Now, his books and records will show whether he conformed. . . . [I]f he knew of the schedule, and *generally adhered* to it, then, it seems to me that he is participating in his con-

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[12]This is the so-called "Adherence" theory (508 F. 2d at 231, 233).

[13]This is the so-called "Membership Ratification" theory (508 F. 2d at 231).

duct in furtherance of this conspiracy." [Reptr's Tr., April 23, 1973, at 5-7].

Acknowledging the pivotal nature of petitioners' legal theory which it had adopted, the district court certified its ruling for interlocutory appeal, stating:

> ". . . I would hate to get a long way down this road that we are looking down and send out all these notices at considerable expense, and have a general hearing, and go through all the laborious effort of individual issues, and have the appellate court conclude *that the proof on the individual issue that the court accepted along the lines that I've talked about here* is not sufficient. It seems to me that it would be well to certify this matter and be guided accordingly." [*Id.* at 7-8].

E. The Court of Appeals' Decision.

In sum, the Court of Appeals in reversing the order ruled it was clear under "substantive antitrust law" that in order for any of the 2,000 broker class members to be liable in this treble damage case "he must have 'knowingly, intentionally and actively participated in an individual capacity in the scheme' " (508 F. 2d at 232); that even petitioners' own proposal for proof of each claim on the adherence concept would involve separate proof as to the liability of each defendant class member with whom each seller dealt; that such evidence would at best only make out a *prima facie* case and each defendant "would then have the right to come forward and submit his proof" (508 F. 2d at 233, 235-36); that "Each defendant is clearly entitled

to come forward and prove that he did not know of the commission schedule or that he opposed it or ignored it or perhaps, some other yet unknown defense." (508 F. 2d at 233); that proof of each claimant's injury must also be adjudicated (508 F. 2d at 233, 236 nn. 8, 9); that such proof, and each defendant's response thereto at trial, would cause the trial to "fall into individualized law suits." (508 F. 2d at 236); that the common questions did not predominate over those affecting individual members (508 F. 2d at 233); that the proposed massive class suit, pitting 400,000 or more sellers seeking 750 million dollars against 2,000 brokers was not fair, efficient or superior to available alternatives given the tremendous problems posed by trial coupled with the "staggering" exposures thus generated (508 F. 2d at 234-35).

For these reasons, the Court of Appeals concluded that plaintiffs had not demonstrated "that the questions of law or fact common to the members of the class predominate over the questions affecting individual members"; or that "this class action is superior to other available methods for the fair and efficient adjudication of the controversy"; or that the suit is manageable (508 F. 2d at 233, 235-36).

REASONS FOR DENYING THE WRIT.

Plaintiffs advanced a plan or blueprint for the trial of their proposed class suit. The district court accepted plaintiffs' approach, but requested the Court of Appeals to examine the legal principles upon which it was founded. That Court, responding to the certification, held that the district court's order and petitioners' proposed approach were opposed to settled principles of substantive law and contrary to the standards of Rule 23(b)(3). The Court, therefore, ruled that this action is not suitable for class action treatment.

The decision is based on long-settled principles of antitrust law. It properly applies the specific requisites of Rule 23 delineating appropriate class actions. It does not conflict with the decisions of this Court discussing Rule 23 and is within the Court of Appeals' jurisdiction under 28 U.S.C. §1292(b) on review of interlocutory orders as certified by the district court.

This case, therefore, does not present any "special or important reasons"[14] for review by this Court, and the petition should be denied.

I

The Court of Appeals' Decision Did Not Outlaw Antitrust Class Actions and Does Not Conflict With This Court's Decisions Respecting Rule 23.

Petitioners misstate both the nature and effect of the decision below in an attempt to set up a conflict with the decisions of this Court dealing with class actions in antitrust cases, *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *American Pipe and Construc-*

[14]Rule 19(1.), Rules of the Supreme Court of the United States.

tion Company v. Utah, 414 U.S. 538 (1974) and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Petitioners' argument proceeds on the assertion that "the clear import of the Court of Appeals' decision is that class actions seeking treble damages for alleged antitrust violations under the Sherman and Clayton Acts are precluded" [Pet. at 10]. Upon this faulty premise, petitioners state the *Kline* decision will "put an end to one of the most effective tools for private enforcemen of the antitrust laws" and is contrary to these decisions of this Court [Pet. at 12].

The Court of Appeals, of course, did not announce, either explicitly or by reasonable inference, a blanket rejection of treble damage antitrust class actions. Petitioners base their patently erroneous postulate on a single passage from the Court's discussion of the impact of the Rule 23(b)(3) superiority standards.[15] Clearly the Court was addressing, in narrow focus, only the extreme unfairness sought to be visited on the 2,000 defendant class members through the device of this class action. It stated the intent of Congress was to punish the violator "for his own malefactions, not

[15]That passage was, "We find that the same reasoning applies to treble-damage actions under the Sherman and Clayton Acts" (508 F. 2d at 235). The Court was addressing only the fairness aspect of the superiority requisite and analogized the situation here to that presented in decisions under the Truth in Lending Act which held class treatment not appropriate where "outrageous amounts [were sought] in statutory penalty cases" (508 F. 2d at 234), referring to *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972); *Shields v. First National Bank of Arizona*, 56 F.R.D. 442 (D. Ariz. 1972) and *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972).

to subject him to vicarious liability by the coincidence of a class action for the staggering damages of the multitude" (508 F. 2d at 235).[16] The statement petitioners refer to was made in that closely circumscribed context, and so viewed is correct.

Furthermore, a fair reading of the entire segment of the decision dealing with the superiority-fairness aspects makes it clear that the ruling on this facet of Rule 23 was additionally grounded in other elements pertinent to the superiority inquiry. These included: (1) the absence of any showing that " 'economic reality' might dictate that this action proceed as a class action or not at all" (508 F. 2d at 233); (2) the lessened need for the proposed class action in light of petitioners' damages prayer which showed that individual damages in many instances "would be substantial" 508 F. 2d at 234;[17] and, (3) the patent unmanageability of multitudes of individual jury trials which would flow inevitably *in this case* from the mandates of substantive antitrust law overlaid upon plaintiffs' theory of trial.[18]

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[16]In that connection, the Court postulated a $1,000 overcharge potentially subjecting a broker to $750 million liability because "he joined a realty board and received and followed suggestions as to proper commissions" (508 F. 2d at 235).

[17]In that context the Court stated that the potential benefits of the proposed class did not rise to the same dimensions as in *Eisen* where the individual award sought was only $70, or in *In Re Hotel Telephone Charges*, 500 F. 2d 86 (9th Cir. 1974), where the individual claim was only $2 (508 F. 2d at 234).

[18]The Court explicitly linked its conclusion regarding superiority to "the problems engendered by the requirement of proof of damages" (508 F. 2d at 235), pointing out that Rule 23: ". . . does not eliminate the ultimate need for individual proof of damages by each member of the class. Nor does it foreclose the right of each defendant to assert his defenses before a jury if one is requested." (508 F. 2d at 236, n. 8), and that: ". . . the defendant as to each [real estate sale] transaction would be entitled to give his particularized version." (*Id.*, n. 9). These considerations were: ". . . matters which would have to be gone into as

Moreover, it is of course evident that the decision below rests as well on additional grounds sufficient in themselves, such as the absence of predominating common questions and the unmanageability of the suit.

The Court of Appeals in no way disregarded the class action comments of this Court in *Hawaii*, *American Pipe* or *Eisen*. Indeed the decision below was addressed to and applied the "specific rules for delineating the appropriate plaintiff-class", referred to in *Hawaii* (405 U.S. at 266). *American Pipe* dealt only with the propriety of intervention following class denial. Indirectly it indicated general approval of class actions, but the decision below in the context of the case presented is not contrary.

In *Eisen*, as petitioners recognize [Pet. at 13], "the appropriateness of class actions in the context of treble damage actions was not questioned", and it was thus not an issue passed upon. However, this Court did hold that Rule 23 may not be used to undermine "the traditional rules and procedures applicable to civil trials." (*Eisen*, 417 U.S. at 40 L. Ed. 2d at 749). In the present case the Court of Appeals applied this precept of *Eisen* in rejecting petitioners' position that the proof requisite to establish each claim could be short-circuited through generalized means and that each class defendant was, somehow, not entitled to a full defense against the charges (508 F. 2d at 236 and nn. 8, 9).

Thus the Court did not approach the matter of the fairness of the massive class suit in isolation as petitioners portray. It considered and applied all requisites prescribed by Rule 23(b)(3). Only in the context, of

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many times as there were sales by that defendant during that 4-year period." (*Id.*)

the factors present in this case but not necessarily in other cases, did the Court say that, "*in this situation*" the proposed treble damage class led "to an ad absurdum result" and thus contravened the fairness requirement of Rule 23(b)(3) (508 F. 2d at 235). The decision below was entirely appropriate in the context of the special facts presented by this extreme class suit.

II

The Court of Appeals' Decision Does Not Conflict With Any Decision of This Court Regarding Proof of Participation in an Antitrust Conspiracy.

The Court of Appeals held that "substantive antitrust law" requires the trier of fact to find that an alleged conspirator "knowingly, intentionally and actively participated in an individual capacity" in the alleged conspiracy before liability can be fastened upon him (508 F. 2d at 230, 232, 233). The Court also ruled that Rule 23 cannot deprive the alleged participant of his right "to come forward and submit his proof" (508 F. 2d at 236).

Contrary to petitioners' contentions [Pet. at 26-30], the Court below correctly applied the decisions of this Court governing proof of conspiracy in antitrust cases,[19]

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[19] *Theatre Enterprises, Inc. v. Paramount Distrib. Corp.*, 346 U.S. 537 (1954); *Interstate Circuit v. United States*, 306 U.S. 208 (1939); *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950). The basic test was set forth by this Court in *Theatre Enterprises:*

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. [Citations omitted.] *But this Court has never held that proof of parallel business behavior conclusively establishes agreement* or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Cir-

including *National Association of Real Estate Boards* and *Interstate Circuit*, which petitioners claim was misapplied.

The Court did not, as petitioners suggest, hold that participation in a conspiracy may not be shown by adherence to the fee schedule; indeed, at several junctures it assumed such proof could establish a *prima facie* case (508 F. 2d at 233, 236).[20] What the Court below did rule in this respect was that, where the critical element of agreement has not been conceded as it was in *National Association of Real Estate Boards*, the issue of each broker's alleged adherence is a fully litigable issue. Each person charged is entitled to a trial on the crucial issue whether he "knowingly, intentionally and actively participated in an individual capacity in the scheme" (508 F. 2d at 232). Correctly, it ruled that that question cannot be *resolved* at trial by *generalized* evidence (*e.g.*, in the words of the district court, by proof that a broker "conformed generally" to the schedule).[21]

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cumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; [Footnote omitted] but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." (346 U.S. at 540-41). See also: *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F. 2d 656, 665 (9th Cir. 1963), *cert. denied* 375 U.S. 922 (1963), *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F. 2d 199 (3d Cir. 1961), *cert. denied* 369 U.S. 839 (1962).

[20]The significance to class certification of the difference between a *prima facie* case and a complete trial apparently escapes petitioners, but not the Court of Appeals (508 F. 2d at 236), and not this Court. Compare *Interstate Circuit, supra*, with *Theatre Enterprises, Inc., supra.*

[21]*National Association of Real Estate Boards* itself highlights this distinction. There the code, concededly subscribed to by all members, was an open-and-shut agreement, *and was not ques-*

(This footnote is continued on next page)

Furthermore, the ruling below in no way contravened this Court's *Interstate Circuit* decision. There, after a full trial, it was found that each defendant "knew that cooperation was essential to the successful operation of the plan." (306 U.S. at 226). Thus when that case came to this Court, the agreement issue had already been litigated and adjudicated. That element has been neither conceded nor yet litigated here, and whether it can be supplied at trial is an important issue needing litigation with regard to each defendant broker as part of each seller's claim that he sustained injury by reason of conspiratorial conduct.

The Court of Appeals, therefore, did not misapply this Court's prior decisions. It simply reiterated the bedrock principle that each person charged must be shown to be a knowing participant in a conspiracy, and has a right to defend against the charge, before a treble damage judgment may be had against him.

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tioned, either in the district court (84 F. Supp. 802) or in this Court. The only issue was whether the agreement was an illegal restraint of trade. Here all brokers vigorously deny participation in any agreement. Furthermore, in *National Association of Real Estate Boards,* this Court affirmed the defense judgment in favor of the National Association and its officer, the two defendants who *had* contested participation in the agreement.

Petitioners' argue the Court of Appeals misstated the teaching of that case by its conclusion that that decision required, for a *per se* violation, an agreement "and" adherence or consensual approval [Pet. at 27]. This argument has no merit. The Court below was focusing upon the requirement for proof of a member's participation in an agreement, not whether an agreement existed. A member is not responsible for an agreement unless he participates; thus, before that member is liable there must be shown both an agreement *and* that member's adherence to the agreement.

III

The Court of Appeals Did Not Preempt the Trial Court's Discretion.

The trial court made the class order after two years of pretrial, extensive discovery, briefing and two hearings. The ruling was certified for interlocutory appeal once the definitive decision had been made to adopt petitioners' generalized proof concepts as a means of accommodating this otherwise impossible class litigation. Clearly the district court certified its order as a wise precaution for appellate review and guidance on the unusual procedures adopted. See page 8, *supra*.

The decision of the Court of Appeals did not "preempt" or displace the trial court's discretion as petitioners now claim [Pet. at 15-17]. Rather it responded to the lower court's invitation for review and guidance. In essence the Court of Appeals ruled the trial court had misconstrued the "substantive antitrust law" and misapplied the standards of Rule 23(b)(3).

The trial court's discretion was not preempted.

IV

It Is Neither Necessary nor Appropriate in the Present Case for This Court to Articulate Standards for Appellate Review of Class Certifications.

This case presents neither conflict with a decision of this Court nor any novel question appropriate for review. Nor does it present any basis for the articulation of any "standards" to govern appellate review of class certifications, as petitioners request [Pet. at 15, *et seq.*].

Petitioners assert the Court of Appeals found the suit unmanageable because of its size alone [Pet. at

21], but it is evident this was not the predicate of the ruling. Size was only one part of the equation, the others involving the analysis of the issues of fact and law presented for jury trial resolution.

Next, petitioners claim the Court improperly passed upon "evidence" [Pet. at 19]. This is not so. The Court did not rule on the evidence; it merely analyzed plaintiffs' proposed *plan* of trial in light of the issues presented. Moreover, the Court did not rule that adherence to the schedule could not be *prima facie* evidence of a member's participation, but only that such proof would not be conclusive, and that each defendant would still be entitled to introduce his own evidence in defense.

In like vein, petitioners argue an "implied premise" of the decision below necessitates that they "try the merits . . . to permit a class certification" [Pet. at 18, 19]. This is not so. It is plain the Court was aware of and responsive to this Court's ruling in *Eisen* that "a preliminary or 'mini-hearing' on the merits to determine whether . . . [the action] might be maintained as a class action was improper" (508 F. 2d at 230, n. 3).

Nor did the Court make any conclusion "on the ultimate merits of the litigation", as claimed by petitioners [Pet. at 19], by its ruling that the admitted preparation and printing of the price schedule by the Board and its distribution is not enough under "substantive antitrust law" to establish civil or criminal liability as to the Board's members (508 F. 2d at 530-32). Manifestly this was a statement on a question of law, and was correct.

The Court properly responded to the district court's request for review and guidance on the legal questions presented.

Conclusion.

For the reasons stated, the petition for a writ of certiorari should be denied.

Dated: April 16, 1975.

Respectfully submitted,

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